Supreme Court, U.S.
FILED

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PETITTE BROTHERS MINING COMPANY, INC.,
JASPER PETITTE, JOHN PETITTE, JR.
and JAMES BARILL,
Petitioners

v.

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR.,
WILLIAM MILLER, WILLIAM B. JORDAN
and PAUL R. DEAN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HD PP

QUESTIONS PRESENTED

1. Does the Tenth Amendment bar the imposition of personal liability for a corporate debt pursuant to ERISA's controlled group provision set forth in 29 U.S.C. §1301(b)(1)?

2. Does the Fifth Amendment bar the imposition of personal liability for a corporate debt pursuant to ERISA's controlled group provision when it conflicts with expectations under traditional State corporation law?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were as follows:

Appellants: Petitte Brothers Mining Company, Inc.
Jasper Petitte
John Petitte, Jr.
James Barill

Appellees: Joseph P. Connors, Sr.
Donald E. Pierce, Jr.
William Miller
William B. Jordan
Paul R. Dean[1]

STATEMENT OF PARTIES AFFILIATED WITH PETITIONER

There are no parent, subsidiary or affiliate companies of petitioner Petitte Brothers Mining Company, Inc.

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[1] The appellees listed above were Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans ("UMWA Pension Plans") at the time this action was commenced in the District Court in February of 1987. The current Trustees are Michael H. Holland, Marty D. Hudson, Elliot A. Segal and Joseph J. Stahl, II.

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IN THE

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OCTOBER TERM, 1995

PETITTE BROTHERS MINING COMPANY, INC.,
JASPER PETITTE, JOHN PETITTE, JR.
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v.

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR.,
WILLIAM MILLER, WILLIAM B. JORDAN
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITATIONS TO OPINIONS

The October 25, 1995 Judgment and Memorandum of the United States Court of Appeals for the District of Columbia

Circuit, which appears in the Appendix, is reported at 70 F.3d 637 (1995) (No. 94-7223) (App. B). No other orders or opinions in these proceedings have been reported. The October 25, 1995 Judgment and Memorandum affirmed an October 12, 1994 Order and Memorandum, and January 11, 1989 Memorandum of the United States District Court for the District of Columbia (No. 87-490). The District Court's orders also appear in the Appendix (App. C and App. D, respectively).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). On October 25, 1995, the Court of Appeals affirmed two orders of the District Court. Petitioners filed timely petitions for rehearing and suggestion for rehearing *en banc*. The petitions were denied by orders of the Court of Appeals dated December 12, 1995 (App. A-1, A-2). Notifications required by Sup. Ct. R. 29.4(b) have been made because 28 U.S.C. §2403(a) may be applicable. The lower courts have not certified this case to the Attorney General. 28 U.S.C. §2403(a); Sup. Ct. R. 29. 4(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. United States Constitution, Amendment V:

"No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation."

3. Employee Retirement Income Security Act ("ERISA") §4001(b)(1), 29 U.S.C. §1301(b)(1) (1974):

"An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of the Internal Revenue Code of 1986. For purposes of this title, under regulations [29 C.F.R. §2612] prescribed by the corporation [Pension Benefit Guaranty Corporation], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1986."

4. West Virginia Code, §31-1-89 (1974):

"A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which such were issued or to be issued."

STATEMENT OF THE CASE

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act, 29 U.S.C. §§1381-1461 ("MPPAA"). In large part, MPPAA was intended to ensure the collection of withdrawal liability under Title IV of ERISA from employers in declining industries (*i.e.*, coal mining). In such industries, withdrawals from multiemployer pension plans threatened the plans' financial integrity. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 214-217, 226-228 (1986). Under MPPAA, which became effective in September of 1980, an employer who ceases operations covered by a plan is required to pay "withdrawal liability." This represents a withdrawing employer's proportionate share of the plan's unfunded vested benefits. 29 U.S.C. §§1381, 1383, 1391.

After incorporating under West Virginia law in 1971, petitioner Petitte Brothers Mining Company, Inc. ("PBM") conducted coal mining operations until 1981 on a lease in West Virginia. PBM, a signatory to the UMWA Pension Plans ("the Plans"), was owned in equal one-third shares by petitioners Jasper Petitte, John Petitte, Jr., and James Barill ("the PBM individuals"). Between 1974 and 1981, the PBM individuals also operated M & J Coal Co. ("M & J"), a general partnership; between 1980 and 1984, they operated Maiden Mining Co. ("Maiden"), also a general partnership. Like their corporation PBM, the PBM individuals owned equal one-third shares of M & J and Maiden.

Under the language of 29 U.S.C. §1301(b)(1), PBM, M & J and Maiden are treated as a "trade or business under common control," or controlled group, for purposes of a signatory employer's withdrawal liability under ERISA. The controlled group provision is derived from federal tax code rules adopted to prevent corporations from claiming multiple tax exemptions by

creating numerous subsidiaries and affiliates.

In February of 1987, the Plans sued PBM in the United States District Court for the District of Columbia to collect withdrawal liability in the amount of $615,682.57. In September of 1987, after discovering the existence of the defunct partnerships M & J and Maiden, the Plans amended their complaint to join the PBM individuals as defendants. The Plans maintained that the Petittes and James Barill, as partners in M & J and Maiden, were members of a controlled group due to the PBM individuals' interests in the two partnerships.

The PBM individuals contended that the application of the controlled group provision to them was prohibited by the Tenth and Fifth Amendments. They argued that to exact personal liability for a purely corporate debt constituted an impermissible abrogation of West Virginia corporation law under the reserved powers clause of the Tenth Amendment, and further amounted to an impermissible taking under the due process clause of the Fifth Amendment.

On October 12, 1994, the District Court (John Garrett Penn, J.) granted summary judgment for the Plans on a statute of limitations issue (App. C-10). In a terse footnote, the District Court found the imposition of withdrawal liability upon the Petittes and Mr. Barill "constitutional" under the Fifth Amendment (App. C-7, C-9 n.4). The District Court did not address any of the Tenth Amendment contentions which have been raised by defendants since early 1988 (App. C-1 - C-11).

Defendants appealed under 28 U.S.C. §1291. On October 25, 1995, the Court of Appeals for the District of Columbia Circuit affirmed the District Court's orders in a Judgment and Memorandum (App. B-1). The Memorandum contended that the question of preemption "does not arise" because ERISA's controlled group provision does not affect the individuals' rights

as PBM's shareholders. Section 1301(b)(1), the Court of Appeals continued, merely holds the "two related partnerships [M & J and Maiden] liable for the debts of the corporation [PBM]" (App. B-2). Acknowledging that the PBM individuals would not be personally liable if M & J and Maiden had been incorporated, the Court of Appeals emphasized that the formation of the partnerships was a "choice appellants made." *Id.* The Court of Appeals also rejected appellants' Fifth Amendment "taking" argument as being foreclosed by this Court's decisions in *Concrete Pipe & Prods. of Calif. v. Construction Laborers Trust of Southern Calif.*, 508 U.S. 602, 113 S. Ct. 2264, 2289-2291 (1993) and *Connolly*, 475 U.S. at 221-228. *Id.*

REASONS WHY THE WRIT SHOULD BE GRANTED

THIS CASE RAISES AN IMPORTANT ISSUE OF FEDERAL LAW AS TO THE CONSTITUTIONAL LIMITS OF ERISA'S REACH INTO PERSONAL ASSETS TO SATISFY THE OBLIGATION OF A CORPORATE SIGNATORY EMPLOYER

A. Tenth Amendment

An analysis of whether federal law preempts state law begins with the presumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Where preemption is an issue, it may be expressed or implied. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977). Absent express language, preemption may occur implicitly when Congress has clearly

occupied the field, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); when compliance with both federal and state regulation is "a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 - 143, *reh'g denied*, 374 U.S. 858 (1963); and/or in cases where state regulation "stands as an obstacle" to the realization of the purposes and objectives of Congress, *Haines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The Court of Appeals found that the issue of preemption does not arise in this case because the PBM individuals were liable as partners in the partnerships M & J and Maiden (App. B-2). However, a preemption issue *does* arise as a result of the implied preemption of the West Virginia law by ERISA's controlled group provision (29 U.S.C. §1301(b)(1)). ERISA's expansive preemption language in 29 U.S.C. §1144(a) ("shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan ...") directly conflicts with, but does not expressly preempt, West Virginia Code §31-1-89 (1974) concerning shareholder limited liability. The West Virginia law here cannot be said to have "a connection with or reference to" a pension plan. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983).

Under West Virginia law, the Plans in this case never could have collected from affiliated companies of a signatory employer organized as a corporation. A conflict exists. It must be scrutinized as a permissible, or impermissible, abrogation of West Virginia law by ERISA under the Tenth Amendment.

The issue before this Court is not whether the PBM individuals have chosen to forego the protection of incorporation by establishing M & J and Maiden as partnerships. That "choice", *i.e.*, the failure to convert the partnerships to corporations in order to avoid personal withdrawal liability, does not make the imposition of personal liability permissible under the Tenth Amendment. Rather, the issue is the extent to which a federal

statute, which is indisputably silent as to the extent of actual preemption, can confer upon a special category of non-government creditor (the UMWA Pension Plans) the right to satisfy an obligation of a corporation against assets of its affiliates — notwithstanding the fact that under State law such assets are not available to satisfy claims against the corporation. Assuming, *arguendo,* that subjecting otherwise protected assets of affiliates of a corporate signatory employer is justified under the controlled group provision in order to overcome an "obstacle" (*i.e.*, traditional state corporation law) to federal objectives, there is no policy in ERISA which justifies the Plans' reaching into personal, non-business assets to satisfy a corporate debt. This is particularly true because West Virginia law, as other State law, distinguishes, at least theoretically, between partnership assets and ultimate partnership liability for partnership debts. *C.f.* West Virginia Code, §§47B-2-4 (defining what property is partnership property), 47B-3-6 ("*all* partners are liable jointly and severally for *all obligations* of the partnership" emphasis added). The language of §1301(b)(1) forms a basis for liability under ERISA for "trades or businesses" — not personal assets — which are under common control.

The controlled group provision, moreover, is derived from federal tax code rules (*see* ..R.C. §1563) which were originally devised in order to prevent corporations from claiming multiple tax exemptions by creating numerous corporate subsidiaries and affiliates. Subsequent Internal Revenue Service regulations in the field of employer pension plans (*e.g.*, I.R.C. §414(c)) providing that employees of trades or businesses under common control shall be treated as employees of a single employer, were devised for primarily regulatory purposes, such as establishing standards for eligibility, vesting and participation. Any regulations implementing §1301(b)(1) were intended to be "consistent and coextensive" with regulations prescribed for similar purposes

under I.R.C. §414(c). *See*, final sentence of §1301(b)(1). The rules adopted by Pension Benefit Guaranty Corporation under §1301(b)(1) (29 C.F.R. §2612) omit any reference to the Internal Revenue Service's regulations. However, it is clear that the use of such rules for collection purposes against the PBM individuals for collection of withdrawal liability far exceeds any intended purposes of the tax code. As Senator Williams stated with respect to §1301(b)(1), its legislative objective is to prevent employers from evading withdrawal liability "by 'going out of business' and resuming business under a different identity." 126 Cong. Rec. S23287 (1980). When the PBM individuals "chose" to form and maintain partnerships, they obviously did not do so with the intent of avoiding PBM's obligations.

B. Fifth Amendment

Apart from a conflict between West Virginia law and ERISA, the case also presents the related issue of a "taking" in violation of the Fifth Amendment. This Court's decision in *Concrete Pipe, supra*, and in *Connolly, supra*, does not undermine the significance of the PBM individuals' contention that application of the controlled group provision to them is an intrusive action by which the government appropriates something for its "own use."

Both *Concrete Pipe*, 113 S.Ct. at 2290-2292, and *Connolly*, 475 U.S. at 225, set out a three-tier test for identifying a taking under ERISA. The first and second tiers — significant economic impact and interference with investment-backed expectations — are clearly satisfied in this case. Intrusive governmental action, the third tier, is also satisfied because ERISA's application destroys the PBM individuals' expectation of freedom from liability for an obligation of PBM, the signatory

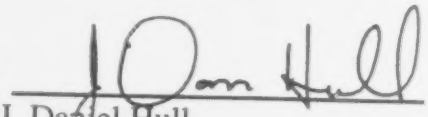
employer, which was a corporation. This taking is "so arbitrary and irrational" that it violates the due process clause. *Connolly*, 475 U.S. at 228 (O'Connor, J., concurring).

In this case, the third tier of the "taking" test as defined in *Concrete Pipe*, 113 S.Ct. at 2291, is satisfied because the federal government has taken something for its "own use" by deploying a severe, if not drastic, collection mechanism to realize legislative goals. While the objectives of ERISA/MPPAA are undeniably important, the controlled group provision, as applied to the PBM individuals, amounts to a taking in violation of the due process clause of the Fifth Amendment. The PBM individuals organized M & J and Maiden as partnerships prior to the effective date of MPPAA. PBM's incorporation in West Virginia prior to the enactment of MPPAA was accompanied by the traditional expectation that PBM's creditors could not reach the assets of PBM's stockholders or the assets of PBM's affiliates. The application of the controlled group provision must withstand constitutional scrutiny at two levels: the trade or business included in the controlled group and the individual owners of the trade or business entity. This reallocation of private property of individuals under the authority of §1301(b)(1) for the benefit of congressionally-approved creditors, who could not reach such assets under State corporate law, clearly constitutes a governmental taking which must be addressed by this Court.

CONCLUSION

For all the foregoing reasons, Petitioners urge this Court to grant their petition for writ of certiorari.

Respectfully submitted,

By: 

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7223 **September Term, 1995**

USDC CV 87-0490

Joseph P. Connors, Sr., et al.,
Appellees,

v.

Petitte Brothers Coal Company, Inc., et al.,
Appellants,

BEFORE: Buckley, Ginsburg and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed November 24, 1995, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

[FILED: December 12, 1995]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7223 **September Term, 1995**
USDC CV 87-0490

Joseph P. Connors, Sr., et al.,
Appellees,

v.

Petitte Brothers Mining Company, Inc., et al.,
Appellants,

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ ROBERT A. BONNER

Robert A. Bonner
Deputy Clerk

[FILED: December 12, 1995]

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7223 **September Term, 1995**

Joseph P. Connors, Sr.,
Trustee of the United Mine Workers of America 1950 Pension Plan
and the United Mine Workers of America 1974 Pension Plan, et al.,
Appellees

v.

Petitte Brothers Mining Company, Inc., et al.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 87cv00490)

Before: BUCKLEY, GINSBURG, and TATEL, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum it is

ORDERED and **ADJUDGED** that the orders of the District Court be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam
FOR THE COURT:
/s/ MARK J. LANGER
Mark J. Langer, Clerk

MEMORANDUM

Appellants, a defunct West Virginia coal mining company and its three individual corporate shareholders, seek review of the District Court's Orders finding the three individual appellants personally liable for "withdrawal liability" to two Pension Plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381. For the reasons stated below, we affirm the District Court's Orders.

Appellants argue that the application of the controlled group provision, *id.* § 1301 (b), violates the Tenth Amendment by abrogating state incorporation law. They are correct that in these circumstances the controlled group provision does result in the imposition of personal liability on Petitte Brothers' shareholders. Appellants, however, ignore the fact that their liability arises not from their status as corporate shareholders of Petitte Brothers, but rather than from their status as *partners* in M&J and Maiden. Thus, the controlled group provision does not affect appellants' rights as *corporate shareholders*; it merely holds the two related partnerships liable for the debts of the corporation. That M&J and Maiden were partnerships rather than corporations was a choice that appellants made. Indeed, had the individual appellants incorporated M&J and Maiden, they would not be personally liable. Accordingly, because the controlled group provision does not impose liability on appellants as corporate shareholders, there is no conflict with state incorporation law, and the question of preemption does not arise.

Appellants next argue that application of the controlled group provision to them results in a "taking" in violation of the Fifth Amendment. This argument is foreclosed by binding and unequivocal Supreme Court precedent. *See Concrete Pipe & Prods. of Calif. v. Construction Laborers Pension Trust for Southern Calf.*, 113 S.Ct. 2264, 2289-92 (1993); *Connolly v. Pension Benefit Guaranty Corp.*, U.S. 211, 221-28 (1986).

Appellants' reliance on Justice O'Connor's separate concurrence in *Connolly* is misplaced: not only did she agree with the holding of the Court, but her concern was "that the imposition of retroactivity liability on employers for the benefit of employees may be arbitrary and irrational *in the absence of any connection between the employer's conduct and some detriment to the employee*," *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (emphasis added), a concern not implicated in this case.

Lastly, appellants argue that the District Court erred in stating that the Plans were entitled to interest, liquidated damages, and attorney's fees and costs. The statute is clear, however, that such an award is mandatory in an action to enforce withdrawal liability. *See* 29 U.S.C. §§ 1451(b), 1132(g)(2); *see also Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1377 (7th Cir. 1992).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH P. CONNORS, SR., et al.,
Plaintiffs

v. **Civil Action 87-0490**

PETITTE BROTHERS MINING CO., INC., et al.,
Defendants

ORDER

This matter is before the Court on **Plaintiffs' Motion for Summary Judgment**. For the reasons expressed in the Memorandum that accompanies this order, the Court finds that the Plaintiff's motion should be granted. Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted, and it is further;

ORDERED that judgment is entered for the plaintiffs, and it is further

ORDERED that defendants shall pay to the 1950 and 1974 Plans the withdrawal liability now due and it is further;

ORDERED that the plaintiffs shall submit to the Court within thirty days from the date of this order a judgment order containing their calculations regarding the amount of the withdrawal liability, any interest, liquidated damages, attorneys' fees and costs assessed to the Court for approval, together with a memorandum in support thereof, and it is further

ORDERED that all other pending motions are denied as moot.

Date: Oct.12, 1994

/s/ JOHN GARRETT PENN
JOHN GARRETT PENN
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH P. CONNORS, Sr., et al.,
Plaintiffs
v. **Civil Action 87-0490**

PETITTE BROTHERS MINING CO., INC., et al.,

Defendants

MEMORANDUM

This case comes before the Court on plaintiffs' **Motion for Summary Judgment**. After careful consideration of the motion, the opposition, and the entire record, the Court concludes that the motion should be granted. The case against the individual defendants, Jasper Petitte, John Petitte, Jr., and James Barill was filed within the statute of limitations.

Briefly, the facts are as follows. Defendant Petitte Brothers Mining Company, Inc. ("Petitte Mining"), a West Virginia corporation, was a party to the National Bituminous Coal Wage Agreements of 1974 and 1978 ("the Wage Agreements"). Pursuant to the Wage Agreements, Petitte Mining was a participating employer in the United Mine Workers of America 1950 and 1974 Pension Plans ("the Plans") and was obligated to and, until March, 1981, made contributions to the Plans on behalf of its employees.

Defendants Jasper Petitte, John Petitte, Jr., and James Barill held an equal number of shares of all of Petitte Mining's outstanding common stock. In addition, the individual defendants were equal partners doing business as M&J Coal Company ("M&J") and

Maiden Mining Company ("Maiden").

On March 26, 1981, Petitte Mining ceased all operations covered under the Plan. Consequently, it completely withdrew from the Plans thereby incurring withdrawal liability for unfunded vested benefits. On February 26, 1987, following Petitte Mining's failure to remit the required withdrawal liability payments designated by the plan sponsor, suit was filed on September 17, 1987.

I.

Summary judgment is proper where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986). Since Connors, the moving party, has the burden of providing the lack of any genuine issue of fact, the Court must view the available facts in the light most favorable to the non-moving party, in this case the defendants. Minihan v. American Pharmaceutical Ass'n, 812 F.2d 726 (D.C. Cir. 1987).

Although the burden on the party opposing a motion for summary judgment is not great, the party is still "required to show specific facts as opposed to general allegations, that present a genuine issue worthy at trial." 10A Wright & Miller, Federal Practice & Procedure at 2727 (2d ed. 1983). In the instant case, the Court concludes that Connors has met the burden of establishing that there is no genuine issue of material fact.

II.

This case arises out of the complete withdrawal of Petitte Mining, from the Plans on March 26, 1981. Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq. (1982), employers who cease to contribute to a pension fund, thereby effecting "complete withdrawal" are obligated to pay withdrawal liability. 29 U.S.C. § 1381(a). This occurs when an employer either "permanently ceases to have an obligation to contribute under a plan or permanently ceases operations covered by the plan." 29 U.S.C. § 1383(a). Under 29 U.S.C. § 1383(e), that is the date of complete withdrawal. The withdrawal liability represents the employer's proportionate share of the plan's unfunded vested benefits. 29 U.S.C. § 1391.

Following an employer's withdrawal from a plan, the plan sponsor shall calculate the amount of the employer's withdrawal liability, "notify the employer of the amount" due and "collect the amount of withdrawal liability from the employer." 29 U.S.C. § 1382. Notification to the employer of the withdrawal liability, along with a schedule and demand of payments is to be made "as soon as practicable after an employer's complete withdrawal." 29 U.S.C. § 1399(b)(1). The employer then has 90 days to request that "the plan sponsor review any specific matter relating to the termination of the employer's liability and the schedule of payments." 29 U.S.C. § 1399(b)(2)(A)(i). After the plan sponsor has made a "reasonable review of any matter raised", the employer must be notified of the decision, the basis for the decision and the reason for any change in the determination, if any. 29 U.S.C. § 1399(b)(2)(B). Notwithstanding any request for review, "withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor no later than 60 days" following demand. 29 U.S.C. § 1399(c)(2). If payment is not made, resulting in default, the plan sponsor may "require immediate payment of the outstanding amount of the employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not made timely." 29 U.S.C. § 1399(c)(5).

Any dispute between an employer and the plan sponsor concerning a determination made under sections 1381 through 1399 of this title must be resolved through arbitration. Either party may initiate arbitration within 60 days after the earlier of:

(A) the date of notification of the employer under section 1399 (b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within 180 days from the date of the plan sponsors demand under section 1399(b)(1) of this title.

29 U.S.C. § 1401(1).

If arbitration is not initiated by either party within the appropriate time, the amount demanded by the plan sponsor is due and payable in accordance with the payment schedule. The plan sponsor may then bring an action for collection in court. 29 U.S.C. § 1401(b)(1).

A claim for collection of withdrawal liability (which includes liquidated damages, interest, costs and attorney fees) must be commenced no later than:

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired actual knowledge of the existence of such a cause of action; except in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f).

On January 28, 1985, in accordance with 29 U.S.C. §§ 1382 & 1399(b)(1), the plan sponsors notified Petitte Mining of its withdrawal liability, establishing a payment schedule and demanded payment by letter, for each of the Plans. No payments were made under the payment schedules. The plan sponsors again sent letters dated August 22, 1985, demanding Petitte Mining make payment of

all past due withdrawal liability and interest by October 31, 1985. The letters also indicated that if payment was not made they would be in default causing the full amount of withdrawal liability to be due and payable without further demand. 29 U.S.C. § 1399(c)(5). Petitte Mining did not contest the requested payments through arbitration. After Petitte Mining defaulted, plaintiffs, trustees of the Plans, filed suit to collect the unfunded withdrawal liability. 29 U.S.C. § 1401(b)(1).

Upon review of the defendant's response to the plaintiffs' first set of interrogatories, plaintiffs determined that Jasper Petitte, John Petitte, Jr., and James Barill, doing business as partners of M&J and Maiden, were under common control with Petitte Mining. The Court granted plaintiffs' motion for leave to amend the complaint to add the individual defendants.

Under 29 U.S.C. § 1301(b)(1), "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer." Therefore, classifying Petitte Mining, M&J and Maiden as "under common control", effectively imposes liability for the fund balance on the individual defendant, in addition to Petitte Mining[1]. Plaintiffs filed a motion to compel an interim payment of withdrawal liability which was treated as a motion for summary judgment by the Court. The motion was granted as to Petitte Mining, but denied as to the individual defendants.[2] At that time, the Court also held that the suit was not barred by the doctrine of laches. The Court concluded that individual notice of withdrawal liability was not required for each member of a control group. In addition, the imposition of withdrawal liability upon the defendants was not a denial of due process and that the common control provisions do not constitute an unlawful taking. See, Memorandum Order filed March 2, 1988.[3]

III.

The issue before the Court is whether the cause of action against the individual defendants is barred by MPPAA's statute of limitation. 29 U.S.C. § 1451(f).[4] Defendants argue that the cause of action arose on March 26, 1981 and as a result the action is time-barred under 29 U.S.C. § 1451(f). Plaintiffs argue that the cause of action arose when the corporation failed to make the demanded payments on April 8, 1985, in accordance with the schedule. The Court concludes that the case was filed well within the statute of limitations which provided until April 7, 1991 (six years from the due date) to file suit.

The determination of what acts or omissions trigger the commencement of the time bar found in section 1451 (f) regarding collection of withdrawal liability is critical to the resolution of the dispute. Guidance is provided under 29 U.S.C. § 1451(a) which states "a plan fiduciary...who is adversely affected by the act or omission of any party...may bring an action for appropriate legal or equitable relief." In Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119, 112 (D.C. Cir. 1989), this circuit points out that "the statute indicated that the plan is adversely affected when it has not received payments which are due and owing." Connor v. Hi-Heat Coal Company Inc., 772 F. Supp. 1, 2 n.1 (D.D.C. 1991). In Joyce, the court specifically held:

> The plan is "adversely affected by the act or omission of any party"...only once it fails to receive the payment it has demanded and to which it is entitled. The employer's complete withdrawal, without more, is an occurrence that hardly affects the plan adversely, but usually sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration and payment. But only an unmet demand removes a dispute from these routine occurrences in the world of the MPPAA and creates the special and distinct harm that casts the dispute into the traditional adversarial arena.

Joyce, 871 F.2d at 1124 (citation omitted).

The employer in Joyce, argued that the date of complete withdrawal establishes the time when the cause of action arises. The Court of Appeals did not find this argument persuasive. The court found that the employer failed to distinguish between the concept of withdrawal liability as addressed in 29 U.S.C. § 1381 and when a cause of action arises which triggers the application of 29 U.S.C. § 1451(f). The court noted:

> We decline to mandate the triggering of the limitations period at a moment (complete withdrawal) when for reasons both practical and epistemological... the plan may not be expected immediately to assess and demand withdrawal liability. We favor, instead, the moment that most ensures that the plans will be able to collect the sum that employers owe them. Our decision thus accords with the Act's most important goals of providing means for recovery and ensuring the financial viability of the funds; our conclusion also accords with the ultimate aim that the workers receive pension payments which they have duly earned.

Id. at 1126 (citation omitted).

The individual defendants argue that the distinction made in Joyce, regarding withdrawal liability and the limitations period in which to collect on a cause of action is not applicable as it relates to the special definition regarding "complete withdrawal" for employers in the building and construction industry. 29 U.S.C. § 1383(b). Moreover, defendants assert, that the Joyce court was influenced by the uncertainty of complete withdrawal as it impacts on the construction industry. The defendants contend that 29 U.S.C. § 1383(a)'s determinative factors, rather than section 1383(b), is controlling in the instant case. However, as noted above, the court's focus in Joyce was on when a cause of action arises under 29 U.S.C. § 1451(f), rather than complete withdrawal as applied to the construction industry under section 1383(b) of this title.

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[1]On January 11, 1989, this court found that Petitte Mining, M&J and Maiden were under common control. Consequently, the individual defendants were

held jointly and severally liable for the withdrawal liability assessed Petitte Mining. See, Memorandum Order at 4. The Court noted that if plaintiffs prevailed on the statute of limitations issue, they would also be entitled to attorneys' fees.

[2]On March 27, 1989, Petitte Mining paid $6,954.84 and $4,861.07 to the 1950 and the 1974 pension plans, respectively.

[3]The March 1988 Order was subsequently appealed to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals granted plaintiffs' motion to dismiss the interlocutory appeal on September 20, 1988.

[4]In the January 1989 Order, the Court noted that although the individual defendants had not stated any basis for their constitutional argument that the withdrawal liability provisions violate the taking cause of the Fifth Amendment, it would withhold a decision until after the statute of limitations issue had been decided. The Court will address that issue now. The court finds that the imposition of withdrawal liability is constitutional. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 222-228, 106 S.Ct. 1018, 1025-1027 (1986) (holding the imposition of withdrawal liability did not constitute compensable taking under the Fifth Amendment taking clause); Pension Benefit Guaranty Corp. v. Gray & Co., 467 U.S. 717, 729-734, 104 S.Ct. 2709, 2717-2720 (1984) (withdrawal liability provisions retroactively applied do not violate the due process clause).

Conclusion

The Court finds that summary judgment is proper. There is no genuine issue of material fact. The cause of action arose on April 8, 1985, when the corporation failed to make the demanded payments. Therefore, the case against the individual defendants was filed well within the statute of limitations which provided until April 7, 1991 (six years from the due date) to file suit. The Court's decision is in accord with Congress' intent to protect the employee's vested benefits by ensuring that payment is made upon termination of the pension plan. Nachman Corporation v. Pension Benefit Guaranty Corp., 446 U.S. 359, 374, 100 S. Ct. 1723, 1732 (1980). Contrary to defendants' assertion, granting plaintiffs' motion for summary judgment does not result in "personal and financial harshness" to defendants. See, Defendants' Opposition at 15. When withdrawal liability was initially assessed it included only unfunded vested benefits. The increase in total balance resulted from the accumulation of interest due to the defendants' failure to make required payments as they became due.

Plaintiffs' motion is granted to the extent that the Plans seek to collect withdrawal liability, from the individual defendants personally. In accordance with the Court's Order also filed on this date, plaintiffs are entitled to an award of interest, liquidated damages and attorneys' fees and costs as provided under 29 U.S.C. § 1451(a)(1). Plaintiffs must submit their calculations regarding the amount of the judgment, any interest, liquidated damages, attorneys' fees and costs assessed to the Court for approval within thirty days.

An appropriate Order accompanies this Memorandum.

/s/ JOHN GARRETT PENN
JOHN GARRETT PENN
Chief Judge

[FILED: October 12, 1994]

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH P. CONNORS, SR., et al.,
Plaintiffs,
v. Civil Action No. 87-0490

PETITTE BROTHERS MINING CO., INC,
et al.,
Defendants.

MEMORANDUM ORDER

This case is before the Court on plaintiffs' motion for summary judgment against the individual defendants'.[1] After carefully considering the motion, the opposition to it, and the record in this case, the Court concludes that the motion should be granted.

The main issue presented by this motion is whether the "control group" provision of the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301 (b) (1), applies to the withdrawal liability provisions for the multiemployer plans, e.g., 29 U.S.C. §§ 1381. Section 1301 (b) (1), which, like § 1381, is found under Subchapter III - "Plan Termination Insurance," provides in relevant part that:

For purposes of this subchapter, under regulations prescribed

[1]Plaintiffs filed a motion to compel interim payments against all defendants, when the defendants moved to extend the discovery. The Court granted the motion as to Petitte Brothers Mining Co., Inc., but not against the individual defendants, who had not even been served with the amended complaint at the time plaintiffs filed their motion. Memorandum Order, filed March 2, 1988. Plaintiffs served John Petitte and James Barill by the time the Court ruled on the motion, and the Court determined that the motion should be treated as a motion for summary judgment as to these defendants since there was no need for discovery on the issues raised. They were subsequently granted until March 25, 1988 to respond.

by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribe under the preceding sentence shall be consistence and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414 (c) of Title 26.

Section 1381 (a) provides that "if an employer withdrawals from a multiemployer plan in a complete withdrawal or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." Under the plain language of these provisions, all trades or businesses (whether or not incorporated) under common control are liable for the withdrawal liability of a member of a controlled group which is a participant in a multiemployer plan.[2]

This result is supported by the applicable caselaw. See Board of Trustees of the Western Conference of Teamsters v. H.F. Johnson, 830 F.2d 1009 (9th Cir. 1987) (withdrawal liability extends to joint ventures of joint venture under common control with contributing participating employer); I.U.E. A.F.L.-C.I.O. Pension Fund v. Barker Williamson, Inc., 788 F.2d 118 (3d Cir. 1986); Connors v. Calvert Development Co., 622 F.Supp. 877 (D.D.C. 1985) (withdrawal liability extends to individual partners of a business under common control with participating employer); Combs v. Adkins & Adkins Coal, Inc., 597 F.Supp. 122 (D.D.C. 1984) (individual partners liable for withdrawal payments); Connors v. Brady-Cline Coal Co., Civil Action No. 85-3772 (D.D.C. March 31, 1987); United Food v. Progressive Supermarkets, 644 F.Supp. 633 (D.N.J. 1986); Robbins v. Pepsi Cola Metropolitain Bottling Co., 636 F.Supp. 641 (N.D.Ill. 1986); Central States S.E. and S.W.

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[2]The definition of "trades or businesses under common control" is found at 29 C.F.R. § 2612.2, which adopts the meaning in § 414 (c) of the Internal Revenue Code of 1954 and the regulations issued thereunder.

Areas Pension Fund v. Long, Civil Action No. 86-CV-73266-DT (E.D.Mich. January 20, 1987).

Furthermore, although several of the courts have mentioned that the purpose of control group liability is to prevent the use of related entities to avoid liability, see, e.g., Calvert, 622 F.Supp. at 882; and Adkins, 597 F.Supp. at 128, those courts did not rely upon findings of improper motive or evasion to hold members of controlled groups liable. Nor did they hold that such findings are required. The individual defendants cite no cases holding that § 1301 (b) (1) does not apply to withdrawal liability for multiemployer plans, or that it applies only where a court finds that a controlled group has been used to evade the collection of withdrawal payments. The statute provides for controlled group liability without inquiry into the purposes for creating the entities within the controlled group.

There is no dispute that M&J Coal Company and Maiden Mining Company meet the ownership criteria for entities which were part of a controlled group with Petitte Brothers Mining Co., Inc., ("PBM"). The three individual defendants each owned one-third of the stock of PBM, as well as one-third interests in the two partnerships. Thus, as the partners of M & J Coal Company and Maiden Mining Company, which are jointly and severally liable for PBM's withdrawal liability, the individual defendants are also liable. This is not a case where shareholders of a corporation are being held liable for the corporate debt solely because they are shareholders. See Board of Trustees of the Western Conf. of Teamsters Pension Trust Fund v. Lafrenz, 837 F. 2d 892, 895 (9th Cir. 1988).

The individual defendants assert that in any event, they cannot be held responsible for the withdrawal liability because they have not received notice and demand for payment pursuant to 29 U.S.C. § 1399, and that holding them liable would constitute a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

The Court previously held that under the MPPAA, notice to PBM constituted notice to all entities in the control group.[3] Memorandum Order, filed March 2, 1988, at 3 ("Memorandum Order").

The Court reaffirms its decision to follow the decisions of the Ninth and Third Circuits, and the decision in the Calvert case from this Court. See Teamsters Pension Trust Fund v. Allyn Transp. Co., 832 F. 2d 502, 506-507 (9th Cir. 1987); I.U.E. A.F.L.-C.I.O. Pension Fund v. Barker Williamson, Inc., 788 F. 2d 118, 127 (3d Cir. 1986); Connors v. Calvert Development Co., 622 F.Supp. 877 (D.D.C. 1985). The individual defendants cite no cases holding to the contrary.

Although the Court previously stated that the defendants had not stated any basis for their constitutional argument, Memorandum Order at 4, if necessary, the Court will address the arguments which the individual defendants raise in the context of the present motion. The Court, however, will withhold a decision on the constitutional question until after the statute of limitations issue has been tried, since a favorable ruling for the individual defendants will preclude the need to address the constitutionality of the control group provision as applied to these defendants. See e.g., Transport Motor Express, Inc. v. Central States, S.E. & S.W. Areas Pension Fund, 724 F. 2d 575 (7th Cir. 1983).

Finally, relying on the case of Central States Pension Fund v. 888 Corp., 813 F. 2d 760 (6th Cir. 1987), the individual defendants assert that the award of attorney's fees, interest, liquidated damages is discretionary. However, that was a case where the district court had granted fees to the employer in the exercise of its discretion under 29 U.S.C. § 1132 (g) (1). Under ERISA, where judgment for withdrawal liability is awarded in favor of the plan, the award of interest, liquidated damages, and attorney's fees is mandatory. 29 U.S.C. §§ 1132 (g) (2) and 1451 (b). See United Retail & Wholesale Employees v. Yahn & McDonnell, Inc., 787 F. 2d 128 (3d. Cir. 1986), aff'd by equally divided Court sub nom. Pension Ben.

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[3]The Court noted that in sending notice of withdrawal liability to PBM, plaintiffs did notify the company of their position that "all members of a commonly-controlled group of trades and businesses are jointly and severally liable to the plan for payment of withdrawal liability." (Plaintiff's Memorandum, filed September 25, 1987, at exhibits 1 and 2.)

Guaranty Corp. v. Yahn McDonnell, Inc., 107 S.Ct. 2171, 55 U.S.L.W. 4662 (1987); Trustees of Amalgamated Ins. Fund v. Geltman Ind., 784 F. 2d 926 (9th Cir.), cert. denied, 107 S.Ct. 90, 55 U.S.L.W. 3232 (1986); Adkins, 597 F.Supp. at 127-128; Connors v. Brady-Cline Coal Co., No. 85-3772 (D.D.C. March 31, 1987). Thus if plaintiffs prevail on the statute of limitations issue in this action, they will be entitled to an award of interest, liquidated damages, and attorney's fees.

SO ORDERED.

/s/ JOHN GARRET PENN
JOHN GARRETT PENN
United States District Judge

Date: January 11, 1984

(2)

No. 95-1461

Supreme Court, U.S.
FILED
APR 11 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

PETITTE BROTHERS MINING COMPANY, INC., JASPER PETITTE, JOHN PETITTE, JR. and JAMES BARILL,

Petitioners,

vs.

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN and PAUL R. DEAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

I. Does a statutory provision, 29 U.S.C. § 1301(b)(1), which imposes joint and several liability upon a partnership under common control with a corporate employer abrogate state corporation law and thus implicate the Tenth Amendment?

II. Does the imposition of withdrawal liability on all entities under common control constitute a compensable taking under the Taking Clause of the Fifth Amendment?

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IN THE

Supreme Court of the United States

October Term, 1995

No. 95-1461

PETITTE BROTHERS MINING COMPANY, INC..
JASPER PETITTE, JOHN PETITTE, JR.
and JAMES BARILL,
Petitioners

v.

JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR.,
WILLIAM MILLER, WILLIAM B. JORDAN
and PAUL R. DEAN,
Respondents

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case arose from a withdrawal liability assessment made by the United Mine Workers of America 1950 Pension Plan and the United Mine Workers of America 1974 Pension Plan (the "Plans") pursuant to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended by* the Multiemployer Pension Plan Amendments Act

of 1980 ("MPPAA"). 29 U.S.C. §§ 1381-1461. The MPPAA requires employers who withdraw from multiemployer pension plans to pay withdrawal liability. 29 U.S.C.§§ 1381-1383.

Withdrawal liability represents the withdrawn employer's proportionate share of the plan's underfunding, and restores the loss to the plan's contribution base caused by the employer's withdrawal. *See generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-25 (1984). Payment of withdrawal liability helps ensure that plans have sufficient assets to pay the pensions promised, but left unfunded by the withdrawing employers. *Id.* at 725.

Petitte Brothers Mining Co., Inc. ("PBM") was a participating employer in the Plans. (App. C-2).[1] PBM withdrew from the Plans in March 1981. At the time of the withdrawal, M&J Coal Company ("M&J") and Maiden Mining Company ("Maiden"), two partnerships, were under common control with PBM. (App. C-2).

The Plans sued PBM and Jasper Petitte, John Petitte, Jr., and James Barill in their capacity as partners in M&J and Maiden (the "Partners") to collect delinquent withdrawal liability payments. Petitioners raised numerous defenses including claims that the MPPAA, as applied, impermissibly abrogated state corporation law in violation of the Tenth Amendment and effected a taking under the Fifth Amendment.

In 1989, the district court found that "the defendants had not stated any basis for their constitutional argument," but

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[1]References to the Appendix to the Petition, which is bound with the Petition, are denoted "App. ___."

withheld a decision until all other issues in the case were decided. (App. D-4). The district court also found that PBM, M&J and Maiden were under common control and, therefore, jointly and severally liable for PBM's withdrawal liability. Because M&J and Maiden were unincorporated entities, the partners were liable. (App. D-3). In October 1994, the district court held that the imposition of withdrawal liability on the Partners did not violate the Taking Clause of the Fifth Amendment. (App. C-6, C-9 n.4).

In affirming the district court, the United States Court of Appeals for the District of Columbia Circuit held that "because the controlled group provision did not impose liability on appellants as corporate shareholders, there is no conflict with state incorporation law, and the question of preemption does not arise." (App. B-2). Relying on *Concrete Pipe & Prod. of Calif. v. Construction Laborers Pension Trust for Southern Calif.*, 113 S. Ct. 2264, 2289-92 (1993), and *Connolly v. PBGC*, 475 U.S. 211, 221-28 (1986), the court found that Petitioners' taking argument was "foreclosed by binding and unequivocal Supreme Court precedent." (App. B-2).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied because this case neither implicates the Tenth Amendment nor raises a new issue under the Taking Clause of the Fifth Amendment. The Tenth Amendment is not implicated because the controlled group provision mandates that corporations and partnerships under common control are treated as a single employer for MPPAA purposes but does not interfere with state law governing personal liability for those entities' obligations. Because the controlled group provision does not abrogate state corporation law, there is no preemption.

This case raises no new issue under the Taking Clause of the Fifth Amendment because the decision below accords with this Court's decisions in *Concrete Pipe* and *Connolly* which held that the application of the MPPAA does not constitute a taking under the Fifth Amendment. Because the application of the controlled group provision does not alter the taking analysis articulated by this Court, this case raises no new issue that requires this Court's intervention.

ARGUMENT

I. The Tenth Amendment is not implicated in this case because the controlled group provision does not abrogate state corporation law.

The court below correctly found no predicate for Petitioners' Tenth Amendment argument. The Partners' liability in this case is based on their status as partners in two unincorporated businesses, under common control[2] with an employer that withdrew from the Plans,[3] not because the controlled group provision mandate shareholder liability in abrogation of state corporation law.

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[2]"Common control" for purposes of 29 U.S.C. § 1301(b)(1) is defined by reference to regulations adopted under Section 414(c) of the Internal Revenue Code. 29 C.F.R. § 2612; Treas. Reg. 1.414(c)-2.

[3]It is a universal principal of states' partnership laws that "[a]bsent any limitation in the partnership agreement, partners are personally liable for obligations of the partnership." *Western Conf. of Teamsters Pension Trust v. H.F. Johnson*, 830 F.2d 1009, 1015 (9th Cir. 1987).

Petitioners concede, as they must, that Congress had authority to enact the controlled group provision.[4] The absence of state law controlled group rules imposing liability on partnerships under similar circumstances does not prevent Congress from exercising its power under the Commerce Clause of the Constitution to establish such rules.[5] It is, therefore, difficult to discern how a Tenth Amendment issue can arise. The personal liability in this case does not flow from this act of Congress but from adherence to the state corporation and partnership laws that Petitioners claim Congress abrogated.

All courts that have considered the controlled group provision have imposed joint and several liability on all members of the controlled group, *e.g.*, *Connors v. Incoal, Inc.*, 995 F.2d 245, 254 (D.C. Cir. 1993); *Central States, S.E. and S.W. Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992); *Western Conf. of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988); *IUE AFL-CIO Pension*

---

[4]This Court previously found that MPPAA withdrawal liability does not violate Due Process Clause. *R.A. Gray & Co.*, 467 U.S. at 730-32. The fact that the statute treats all trades or businesses under common control as a single employer does not alter this finding. The controlled group provision reflects a legislative decision that where formally separate business enterprises share a sufficient degree of common ownership, they should be deemed parts of a single economic unit. *See H.F. Johnson*, 830 F.2d 1009, 1013 (9th Cir. 1987).

[5]Because MPPAA does not regulate the States as States or directly regulate an area expressly reserved to the States, but rather regulates private individuals and businesses, the Tenth Amendment is not implicated. *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Indiana*, 452 U.S. 314, 330 (1981).

Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986), but the extent of liability on the owners of these businesses has been determined by each owner's choice of organizational form. Operating in an unincorporated business form may subject the participants to personal liability. See e.g., *Incoal.*, 995 F.2d at 254; *Personnel*, 974 F.2d at 793; *Lafrenz*, 837 F.2d at 895; *H.F. Johnson*, 830 F.2d at 1013.

The controlled group provision does not affect the Partners' rights as shareholders; it mandates that M&J and Maiden are jointly and severally liable for PBM's withdrawal liability debt. The Partners' personal liability is the result of their choice to operate M&J and Maiden in an unincorporated form. Since the controlled group provision does not affect state corporation law, the court below correctly determined that there is no preemption. Accordingly, there is no Tenth Amendment violation.

II. This case raises no new issue under the Taking Clause of the Fifth Amendment.

In *Concrete Pipe* and *Connolly*, this Court held that the payment of MPPAA required withdrawal liability does not constitute a compensable taking. *Concrete Pipe*, 113 S. Ct. 2264 (1993); *Connolly*, 475 U.S. 211 (1986). The application of the controlled group provision of 29 U.S.C. § 1301(b)(1) does not alter the taking analysis articulated by this Court.

In *Connolly*, this Court identified three factors to be considered in an analysis of whether the MPPAA withdrawal liability provisions impermissibly take the employer's property under the taking clause of the Fifth Amendment: "(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed

expectations; and (3) the character of the governmental action." *Connolly*, 475 U.S. at 225.

First, since there is a relationship between the employer and the plan, "the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme." *Id.* Second, since pension plans were "the object of legislative concern long before the passage of ERISA," prudent employers had notice that withdrawal itself might trigger financial obligations. *Id.* at 226. Third, the government does not "appropriate any of the employer's assets for its own use. Instead, the Act . . . requir[es] a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." *Id.*

Based on the record of this case, there is no basis to believe that the district court failed to apply the *Connolly* factors properly. Accordingly, this case raises no new issue under the Taking Clause of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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